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IN THE

Supreme Court of the United States

October Term, 1959

No. 273

ROCCO SALVATORE LUPINO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

And

JOHN FRANK AZZONE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

SYDNEY W. GOFF
1008 Minnesota Building
Saint Paul 1, Minnesota
Counsel of Record

RICHARD B. RYAN
ALLEN H. AARON
1008 Minnesota Building
Saint Paul 1, Minnesota
Of Counsel

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Rocco Salvatore Lupino and John Frank Azzone pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals entered in the above entitled cases on July 7, 1959.

CITATIONS TO OPINIONS BELOW

The memorandum opinion of the District Court (R. 9-12) denying petitioner Lupino's motion to dismiss the indictment printed in Appendix A hereto, *infra*, p. 17, is reported in 171 F. Supp. 648. The opinion of the Court of Appeals printed in Appendix A hereto, *infra*, p. 21, has not yet been published.

JURISDICTION

The judgments of the Court of Appeals were entered on July 7, 1959. See Appendix B, page 29, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C., §1254(1) and Rule 22.2 of this Court.

QUESTIONS PRESENTED

1. Can a criminal statute (18 U.S.C. §1073) which embodies sanctions for interstate travel to avoid prosecution under the laws of the place fled from, and which further provides that violations of the statute may be prosecuted only in the Federal judicial district in which the original crime *was alleged* to have been committed, be construed not to require the existence of a state prosecution at any time, and not to require a showing that an original crime was ever alleged by complaint or indictment in any state to have been committed in any Federal judicial district whatsoever?

2. Is it within the intent of Congress, or is it constitutionally permissible to construe a statute (18 U.S.C. §1073) which penalizes travel in interstate commerce to avoid prosecution under the laws of the place fled from, so as to require neither an allegation that the defendant was ever the sub-

ject of a prior state prosecution nor an allegation that he was in fact guilty of a state offense?

STATUTE INVOLVED

The statutory provision involved is 18 U.S.C. §1073, commonly known as the Fugitive Felon Act, the complete text of which is as follows:

> "§1073. FLIGHT TO AVOID PROSECUTION OR GIVING TESTIMONY.
>
> "Whoever moves or travels in interstate or foreign commerce with intent either (1) to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees, for murder kidnapping, burglary, robbery, mayhem, rape, assault with a dangerous weapon, arson punishable as a felony, or extortion accompanied by threats of violence, or attempt to commit any of the foregoing offenses as they are defined either at common law or by the laws of the place from which the fugitive flees, or (2) to avoid giving testimony in any criminal proceedings in such place in which the commission of an offense punishable by imprisonment in a penitentiary is charged, shall be fined not more than $5,000.00 or imprisoned not more than five years, or both.
>
> "Violations of this section may be prosecuted only in the Federal judicial district in which the original crime was alleged to have been committed or in which the person was held in custody or confinement. As amended Apr. 6, 1956, c. 177 §1, 70 Stat. 100."

STATEMENT OF THE CASE

Indictments against each petitioner under 18 U.S.C. §1073, were returned in the District of Minnesota on *June 4, 1958*, for acts alleged to have taken place on or about the 30th day of September 1953 (R. 1-4).

Neither indictment alleged that there was pending or had been in existence any prosecution by any state against either petitioner (R. 1-4).

Neither indictment alleged that either petitioner had committed any crime whatsoever against any state (R. 1-4).

Each petitioner promptly moved to dismiss the indictment upon the grounds that the court was without jurisdiction either of the subject matter or person of the petitioner and that the indictment did not state facts sufficient to constitute offenses against the United States because neither did the indictment allege an existing or pending prosecution against him by the State of Minnesota, nor did such prosecution in fact exist (R. 4-8, 13). The motions were denied (R. 9-12, 13-14).

Consolidated trial commenced on October 1, 1958 before the Honorable Edward J. Devitt (R. 43). On October 8, 1958 during the Government's case in chief, it was stipulated in open court that up to that date no charges had been filed by the State of Minnesota against either of the petitioners (R. 43).

When the Government rested its case in chief against petitioners each moved for judgment of acquittal upon all of the grounds asserted in the pretrial motions for dismissal and upon the ground of the insufficiency of the evidence, on the same date (R. 44).

Both motions were renewed after both sides had rested and the testimony was closed. Those motions were denied on the same date (R. 44).

Verdicts of guilty were returned against petitioners on all counts of both indictments on October 24, 1958 (R. 32-33). On October 28, 1958, subsequent to verdicts and prior to judgments, petitioners renewed their motion for judgments of acquittal upon the ground that the evidence was insufficient to sustain conviction in that it was conclusively established that the State of Minnesota had initiated no prosecution against petitioners and that the Government had offered no evidence tending to prove that the State at any time contemplated such prosecution (R. 33-34). The motion was denied (R. 34).

Judgments pursuant to the verdicts were entered against each petitioner on November 4, 1958 (R. 34-36).

Timely appeal was taken to the Eighth Circuit Court of Appeals by each petitioner (R. 37-39). The Circuit Court of Appeals affirmed the judgments of the District Court (See Appendix B, p. 29, *infra*).

REASONS FOR GRANTING THE WRIT

1. The Circuit Court has decided questions of Federal law which have not been settled by this Court. This Court has never written an opinion construing or interpreting 18 U.S.C. §1073. The importance of the questions is, of course, a matter of opinion; however, the need for clarification as to the meaning of the statute may be illustrated by pointing out that the Circuit Court's judgment in the instant case is diametrically opposed to a recent holding of a Federal district court. See *United States v. Rappaport*, D.C. Ill., 156

F. Supp. 159. Moreover, as we shall hereinafter point out, the philosophy and reasoning of the decision below is in basic conflict with that expressed in all other circuits in which the statute has been construed.

As petitioners pointed out in the statement of the case herein, the indictments pursuant to which they were convicted alleged neither that they, or either of them, had been the subject of a state prosecution for any of the offenses designated in Sec. 1073, nor that they, or either of them, had in fact committed any such state offenses. It is the contention of petitioners that Sec. 1073 requires the initiation of a state court prosecution for one of the crimes specified therein as a condition precedent to the initiation of a Federal prosecution for violation of the statute, or that in the alternative, for constitutional reasons, the statute requires as an essential element, to be *alleged* and proved, that one charged thereunder must have committed a state offense.

If we are correct in either of our alternative contentions, an injustice has been done to the petitioners, and can be done to others, and the judgments of the district court and circuit court herein should not be allowed to stand.

2. In addition to the fact that the questions involved in this case constitute, as we have suggested, important Federal questions of statutory construction heretofore unresolved by this Court, and in addition to the need for clarification that exists, petitioners contend that the holdings of the lower courts herein constitute a deprivation of the rights of petitioners under the Due Process clause of the Fifth Amendment to the Constitution of the United States, and that the judgments were upheld contrary to a squarely applicable decision of this Court in one highly important particular.

Petitioners argued to the District Court and to the Circuit Court, and contend here that 18 U.S.C. §1073 requires the commencement of a state prosecution prior to the initiation of a Federal prosecution. There is no dispute as to the fact that no state prosecution was ever commenced against either petitioner. As stated by the Circuit Court in its opinion herein,

> "It is established that no prosecution has ever been commenced by the State of Minnesota against either of these appellants or against any other person for either of the alleged crimes of murder of Anthony Ralph DeVito or kidnapping of him. * * * If in law a state prosecution was an essential prerequisite as contended, the conviction appealed from should be reversed and the indictments against appellants dismissed."

See Appendix A at p. 22, *infra*.

Without here submitting to this Court all of the detailed arguments in support of our contention as to the necessity of a prior state prosecution, we do wish to point out certain highlights at this time. We respectfully direct this Court's attention to the second paragraph of the Act, p. 3, *supra*.

The requirement that violators of the Act may be prosecuted only in the Federal judicial district in which the original crime "was *alleged* to have been committed" of necessity refers to an allegation which existed in the past or prior to the time of the Federal indictment. The reference can only be to an allegation in a state prosecution, for it is not required that there be any allegations in a Federal prosecution prior to indictment, and if the reference were to the Federal indictment itself, the appropriate language would be "*is* alleged to have been committed." In using the past

tense, "was", the Act clearly contemplates that a previous state charge has been filed against an alleged violator of Section 1073. It should thereupon be obvious, in accordance with elementary rules of grammar and in accordance with the dictates of common sense, that unless an original crime "was alleged to have been committed" in an appropriate state court proceeding prior to the Federal indictment, Section 1073 cannot become applicable and cannot form a basis for prosecution.

If no state has alleged that a crime has taken place it follows that there is no Federal judicial district in which a valid prosecution under Section 1073 can be commenced. When venue can be laid in *no* federal court, the Federal Courts, by hypothesis, lack jurisdiction. To avoid this conclusion, one would have to read into the last paragraph of the Act the following sentence or its equivalent:

> "If a state has never alleged that an original crime has been committed, then prosecution may take place in any federal district within the geographical confines of the state in which the *federal government alleges* that the original crime was committed."

Moreover, the language "was alleged to have been committed", was consciously inserted into the Act by Congress as a result of dispute and discussion on the floor of the United States Senate. The venue provision, as it read in the original draft of the Bill prior to being amended on the floor of the Senate, was as follows:

> "Violations of this act may be prosecuted only in the Federal judicial district in which the crime was committed."

See pp. 5735-5737 of Vol. 78, Part 6, of the Congressional Record for the Second Session of the 73rd Congress.

But, perhaps more basic and more significant for purposes of this petition than petitioners' desires that this Court authoritatively construe the Act in accordance with petitioners' arguments, as partially developed above, are constitutional questions that are involved.

Nowhere in the express language used in Section 1073 does one find a requirement that to be within its sanctions an accused must have committed a crime against the state. It follows that, if the fact of an existing or pending state prosecution is not, despite our contentions, an essential element of the offense, one who has had no connection with the offense against a state may be convicted and sentenced under Section 1073 merely upon allegations and proof that (1) a state crime had been committed, (2) he has traveled in interstate commerce, and (3) he entertained an intent to avoid possible or future prosecution. In other words, granting the commission of the state offense by *someone*, then *anyone* who travels in fear of prosecution, without more, would be guilty of a violation of the Act.

The due process clause of the Fifth Amendment forbids deprivation of liberty by a statute which is so far beyond the necessity of the case as to be an arbitrary exercise of governmental power. 16A C.J.S., *Constitutional Law*, §567, p. 539.

> "* * * So, laws which are drawn so widely as to destroy the innocent in order to catch the guilty are a denial of due process." 16A C.J.S., *Constitutional Law*, §569(5), p. 584.

A statute "* * * creating and defining an offense * * * must be a reasonable exercise of power possessed by the * * * legislative body * * *, and must not arbitrarily and unreasonably prescribe that certain acts inherently and gen-

erally innocent shall constitute criminal offenses * * *." 16A C.J.S., *Constitutional Law*, §580, pp. 624, 625. The right to travel is a part of the liberty guaranteed under the Fifth Amendment. *Kent v. Dulles*, 357 US 116, 2 L. Ed. 2d 1204.

Accordingly, the Fifth Amendment requires either that the Act be held unconstitutional, or that as an essential element of the federal offense, the accused actually have in fact had some connection with the commission of the state offense, either by having committed the same, or by having been duly charged with its commission by the state.

Apart from the fact that Due Process requires as an essential element of the Federal offense that an accused either (1) have committed a state offense, or (2) have been charged with an offense by the state, we note that the legislative history of the Act, as embodied in the Congressional Record, clearly indicates that Congress never intended in the Federal Act to punish one who was neither guilty of the state offense nor been charged by the state. See pp. 5735-5737, of Vol. 78, Part 6, of the Congressional Record for the Second Session of the 73rd Congress.

Accordingly, we re-emphasize that the indictments against each petitioner, in addition to the fact that they do not allege prior state prosecutions, *also do not allege that either petitioner committed any crime against the State of Minnesota* (R. 1-4). The indictments merely allege flight to avoid prosecution for murder and kidnapping, without alleging that petitioners perpetrated either of said state offenses. We emphasize that the fact that the indictments do not allege that either petitioner committed any crime against the State of Minnesota is not the product of an artificially narrow construction by petitioners of the indictments. The Government requested instructions upon the theory that no

such allegation was necessary. See Government's Requested Instructions Nos. 8 and 9, at pages 14-15, and 51 of the supplemental Transcript accompanying this Petition. No. 9, appearing at page 51 of said Transcript, contains the following language:

> "You will notice from the instructions I have just given you that it is not necessary that you find that the particular defendant with whom you are concerned actually committed the crime of murder or kidnapping in the State of Minnesota, it only being necessary that such crime was committed by someone and did in fact occur."

The Circuit Court herein held that it was not constitutionally necessary to allege and prove the commission by petitioners of the state offenses, as an alternative to alleging and proving the existence of a state prosecution against them. It held that an allegation that crimes had been committed, and that the petitioners fled with intent to avoid possible prosecution for same, was a sufficient presentation in the indictment of the "gravamen" of the offense. The Circuit Court pointed out that the District Court had instructed the jury that it could not convict for the Federal offenses unless convinced beyond a reasonable doubt that petitioners had committed the state offenses. It seems clear that the reason that the Circuit Court emphasized the jury instruction referred to was that the Circuit Court felt that even though the indictment did not *allege* the complicity of petitioners in the state offenses, the defect was cured by the fact that the Federal Government established their guilt, to the satisfaction of the jury.

Accordingly, we note that not even the two Federal cases cited by the court below, *i.e., United States v. Bando,* 2 Cir.,

244 F. 2d 833, and *Barker v. United States*, 5 Cir., 178 F. 2d 803, support its conclusions here. Both of these cases admittedly contain language contrary to our position that the Act, construed as a whole, requires the prior initiation of a state prosecution. However, it is clear in *Barker* that the indictment clearly charged that the defendant committed the crime against the state, and it is equally clear in *Bando* that Section 1073 is violated only if (1) the state had already initiated a prosecution, or (2) *the accused* had in fact committed the state offense and the state would initiate the prosecution. See 244 F. 2d at 843. The indictments here allege *neither* of these elements (R. 1-4).

In fact, in every case dealing with the meaning of that portion of the Act with which we are concerned, the court has taken the position that the Act meant to penalize only one who in fact had committed an offense against a state or who had been charged by a state with an offense; accordingly, the Circuit Court below reached a result in conflict with the reasoning in all of said prior cases. See *United States v. Brandenburg*, 3 Cir., 144 F. 2d 656; *United States v. Bando*, 2 Cir., 244 F. 2d 833, 843; *Barker v. United States*, 5 Cir., 178 F. 2d 803; *Macnza v. United States*, 5 Cir., 242 F. 2d 339, 340; *United States v. Rappaport*, D.C. Ill., 156 F. Supp. 159; *United States v. Miller*, D.C. Ky., 17 F. Supp. 65; *Simmons v. Zerbst*, D.C. Ga., 18 F. Supp. 929. See also *United States v. Reing*, 3 Cir., 191 F. 2d 297, in which the fact of the commission of the state offense by the accused was conceded.

Our primary contention is and has been that as a matter of statutory construction, a prior state prosecution is required by Section 1073 as an essential element thereunder. For reasons previously stated, we think that the clarifica-

tion of that question is a task of sufficient magnitude and importance to justify the granting of this writ. If this Court should uphold petitioners' views on that question, then this Court could avoid the problem of having to decide the constitutionality of the statute that by its express terms does not in so many words require the commission of a state crime as a condition precedent to conviction for the Federal offense. Conceding that the statute can be salvaged by reading into it a requirement that the Federal Government must allege and prove the commission by the accused of the state offense as an alternative to alleging and proving the existence of a prior state prosecution, we maintain, nevertheless, that this Court should grant this petition on the grounds that the indictments herein cannot support the judgments entered because of the omission therefrom of an essential element of the Federal offense. See *United States v. Carll*, 105 US 611, 26 L. Ed. 1135. It was there held (105 US 612-613, 26 L. Ed. 1135):

> "In an indictment upon a statute, it is not sufficient to set forth the offense in the words of the statute, unless those words of themselves fully, directly and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offense *intended* to be punished; and the fact that the statute in question, read in the light of the common law, and of other statutes on the like matter, enables the court to infer the intent of the Legislature does not dispense with the necessity of alleging in the indictment all the facts necessary to bring the case within that intent." (Emphasis supplied.)

Carll also clearly establishes the principle that an instruction by the trial court to the effect that, before a jury can find a defendant guilty, it must be satisfied beyond a

reasonable doubt that the element missing from the indictment had been proved, did not cure or make whole the defective indictment. A conviction under those circumstances could not stand. Thus, the obvious reliance that the Circuit Court herein placed on the finding of the jury to supply an essential element not set forth in the indictment is in direct conflict with the law as laid down by this Court, and the opinion of the Circuit Court should not be permitted to stand.

We think that the question of statutory interpretation as set forth in the first of the "Questions Presented" in this petition is of sufficient novelty and importance to require an opinion from this Court. However, the reasons for granting the writ become even more cogent and compelling in view of the fact that the Circuit Court has chosen to see no constitutional vice in upholding an interpretation of the Act which requires neither an allegation of a prior state prosecution, nor an allegation of commission of a state crime by the accused. If the basic elements of the offense under 18 U.S.C. §1073 are what the Circuit Court says they are, then interstate travel, plus intent to avoid a non-existent state prosecution, constitute a Federal crime, even if the traveler be innocent of the state offense. We cannot believe that the intent of Congress was to imprison an innocent man, who travels interstate for fear that a state prosecution may at a later date be initiated against him. We similarly cannot believe that the Fifth Amendment to the Constitution of the United States countenances a statute which would authorize the imprisonment of a person under these circumstances. We think the concept of freedom of travel is a hollow one indeed if allegation and proof that a man traveled interstate at a time when he

feared possible future prosecution for a state crime that he did not commit can subject him to five years' imprisonment in a Federal penitentiary. The indictments herein alleged no more than commission of crimes against the State of Minnesota by *someone*, plus travel by petitioners to avoid prosecutions, conceded and stipulated never to have been commenced (R. 14). And, for reasons pointed out in this petition, a jury finding supplying the missing element, *i.e.*, that petitioners did in fact perpetrate the state crimes, cannot retroactively validate the indictments.

We do, of course, concede that this statute does not unconstitutionally impinge upon ones freedom to travel, if construed to penalize interstate travel by one against whom a state has initiated a prosecution for a crime of violence, whether one is guilty or not of its commission. A determination of proper cause by a state for charging a person with criminality is concededly an act of sufficient dignity to authorize a statute invoking sanctions for efforts to avoid a prosecution under those circumstances. We have, in fact, urged this construction as the one required by the Act and as the one that avoids constitutional problems in upholding the Act in view of our conclusion that the Constitution requires, as an alternative to an allegation of an existing prosecution, an allegation of commission of the state crime, which latter element is not expressly spelled out in the Act.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to the United States Court of Appeals for the Eighth Circuit should be granted.

Dated August 1, 1959.

Respectfully submitted,

SYDNEY W. GOFF
1008 Minnesota Building
Saint Paul 1, Minnesota
Counsel of Record

RICHARD B. RYAN
ALLEN H. AARON
1008 Minnesota Building
Saint Paul 1, Minnesota
Of Counsel

APPENDIX A

MEMORANDUM AND ORDER DENYING PRE-TRIAL MOTIONS

United States of America,

Plaintiff,

vs.

Rocco Salvatore Lupino, also known as "Rocky",

Defendant.

The defendant is charged by indictment with violation of 18 U. S. C. A. §1073, the Fugitive Felon Law. It is alleged in the first count of the indictment that the defendant unlawfully fled from Hennepin County, Minnesota, to South Carolina with the intent to avoid prosecution under Minnesota law for the crime of first degree murder. Count two charges that the defendant unlawfully fled from Hennepin County, Minnesota, to South Carolina with intent to avoid prosecution under Minnesota law for the crime of kidnapping.

The defendant has made several motions. The first is to dismiss the indictment because the Court is without jurisdiction of the subject matter or of the person of the defendant, and that it does not state facts sufficient to constitute an offense. * * *

The motions will be taken up seriatim.

The first motion for dismissal is based principally on the theory, that no indictment, information or complaint had been issued against the defendant by the State of Minnesota prior to his alleged flight, and hence there was no "prosecution" pending from which the defendant could flee in contravention of the statute. The defendant argues that the word

"prosecution" as used in the statute contemplates the prior institution of some formal proceedings.

In so far as pertinent, the statute, 18 U. S. C. A. §1073, reads:

> "Whoever * * * travels in interstate * * * commerce with the intent * * * to avoid prosecution * * * under the laws of the place from which he flees, for murder, kidnapping * * * shall be fined not more than $5,000.00 or imprisoned not more than 5 years, or both.
>
> "Violations of this Section may be prosecuted only in the Federal judicial district in which the original crime was alleged to have been committed * * *."

The issue raised by this argument is whether, when it was made a crime to travel in interstate commerce with the intent "to avoid prosecution", the Congress intended that there first be some criminal action instituted by the authorities of the state from which flight was made, as argued by the defendant, or whether it was intended only that the crime be committed and that the defendant travel in interstate commerce with intent to avoid prosecution.

A reading of the statute leaves one with the impression that the principal elements essential to its violation are: (1) the commission of a crime, followed by (2) interstate travel and (3) with intent to avoid prosecution under the laws of the state from which flight originates. There is no indication that the expression "prosecution" is used in any established technical or legal sense.

If the construction urged by the defendant were the correct one, then I dare say that the statute would be an ineffective aid to the capture or prosecution of fleeing felons because of the time which would necessarily be required to institute some formal prosecution. It must be an innate in-

stinct of a person who has committed a crime to immediately leave the scene. By modern means of transportation it takes only a matter of hours for one to reach a state border and move into interstate commerce. It would normally take at least a day, and more likely several days, for a complaint or information to be filed. To summon a grand jury and secure the return of an indictment would probably take much longer. Hence, if defendant's interpretation of the statute is accepted, the law would be an ineffective instrument for justice.

"It is more probable that the Congress contemplated that the law should apply to a person who traveled in interstate commerce in order to avoid being prosecuted, whether formal machinery for the prosecution had been started or not. An examination of the legislative history of the law and of the Congressional Reports accompanying its enactment furnishes no significant guideposts to interpretation, but this is the view of the law adopted by the Court of Appeals for the Second Circuit when, on May 13, 1957, in United States v. Bando, 244 F. 2d 833, it held that no formal indictment or charge was an essential precedent to a violation of the statute. There the Court said that:

> "The words 'to avoid prosecution' means 'to avoid being prosecuted.' The statute does not say 'to avoid *a pending* prosecution.'"

The Court observed that this law was a part of the anti-racketeering legislation passed in 1934 and was intended to enable Federal agencies to go into action against criminals who "flee from the scene of the crime beyond the jurisdiction of the state wherein the crime is committed and eventually escape punishment entirely." The Court then pointed out that the construction urged by the defendant there, as

it is here, would serve in great measure to frustrate federal law enforcement agencies by preventing them from going into action promptly and would set a premium on a quick get-away across the state line by a criminal who had committed one of the crimes of violence set out in the law.

The Court of Appeals for the Fifth Circuit has similarly viewed the statute. See Barker v. United States, 178 F. 2d 803, 5 Cir. (1949).

For the reasons stated, defendant's motion to dismiss the indictment is denied.

* * * * *

Dated: August 14, 1958.

EDWARD J. DEVITT
United States District Judge

(Filed August 14, 1958)

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 16163

Rucco Salvatore Lupino,

Appellant,

v.

United States of America.
Appeal from the United States District Court
for the District of Minnesota.

No. 16164

John Frank Azzone,

Appellant,

v.

United States of America.
Appeal from the United District Court
for the District of Minnesota.

[July 7, 1959.]

Richard B. Ryan (Sydney W. Goff and Allen H. Aaron were with him on the brief) for Appellants.

Fallon Kelly, United States Attorney (Clifford Janes, Assistant United States Attorney, was with him on the brief) for Appellee.

Before Gardner, Chief Judge; Woodrough and Matthes, Circuit Judges.

Woodrough, Circuit Judge.

The appellants were separately indicted in two counts for violations of 18 U.S.C. Sec. 1073, commonly known as the Fugitive Felon Act, in that each of them did (in the first count) "feloniously flee, move and travel in interstate commerce from the County of Ramsey, State of Minnesota, to the City of Florence, in the County of Florence, State of South Carolina, * * * with intent to avoid prosecution under the laws of the State of Minnesota for the crime of murder in the first degree as defined by the laws of the State of Minnesota, to-wit, the murder of one Anthony Ralph DeVito committed on or about the 28th day of September, 1953, in the Third Division, State and District of Minnesota." And in the second count "to avoid prosecution under the laws of Minnesota for the crime of kidnapping as defined by the laws to Minnesota, to-wit, the kidnapping of one Anthony Ralph DeVito committed on or about the 28th day of September, 1953, in the Third Division State and District of Minnesota." They plead not guilty and were tried at the same time, were found guilty by the jury and each was sentenced under general sentence to five years imprisonment and $5000 fine. They appeal separately but their appeals are heard on one record and are submitted as provided by Rule 10(f) of this court upon stipulation approved and certified to us by the District Judge presiding at their trial as the record necessary to fully present the questions raised by the appeals as limited in the stipulation.

Through this procedure but a single point for reversal of the judgments has been urged upon us. It is established that no prosecution has ever been commenced by the State of Minnesota against either of these appellants or against

any other person for either of the alleged crimes of murder of Anthony Ralph DeVito or kidnapping of him. Appellants contend that such state prosecution for one offense or the other is a condition precedent to their prosecution for violation of the Fugitive Felon Act. They properly preserved the point by stipultion of the fact, pretrial motions for dismissal, motions for acquittal made at the close of all the evidence, and motions for acquittal after verdicts and the Court held and instructed the jury that the Government was not required to plead or prove the existence or pendency of a prosecution by the State of Minnesota against either of the defendants for either of the alleged crimes of murder or kidnapping. If in law a state prosecution was an essential prerequisite as contended, the conviction appealed from should be reversed and the indictments against appellants dismissed.

Counsel for appellants analyze the wording of Section 1073, taking first the lone word "prosecution" appearing therein and then the word in its immediate context and then considering the section with its two paragraphs as a whole to persuade that the true intent of the section is to denounce only one who flees into another state with the proscribed intent after the state from which he flees has begun prosecution against him.

But we are not so persuaded. The statute denounces any person who acts in a certain way "with intent to avoid prosecution" and in that context "to avoid prosecution" conveys the concept of acting to avoid "being prosecuted". If one speaks of a person acting "to avoid persecution" or "to avoid execution" certainly without more the thought is con-

veyed of a person acting to avoid being persecuted or executed. It is even so as to prosecution.

We agree with the reasoning and conclusion of the Court of Appeals of the Second Circuit in *United States v. Bando*, 244 F. 2d 833. In that case the charge was conspiracy to transport a fugitive against whom no state charge had been filed. Defendants' guilt depended on such flight being proscribed by Section 1073. Defendants' counsel argued that it would not be an offense under Section 1073 for a person who committed the crime of mayhem to flee across the state lines before a prosecution against him had been formally instituted, as by the filing of a charge or indictment. But the court said (p. 483):

> "'An analysis of Sec. 1073 does not support any such narrow and strained construction. The words 'to avoid prosecution' mean 'to avoid being prosecuted.' The statute does not say 'to avoid *a pending* prosecution.' Nor is the word 'charged' used in the first half of Sec. 1073 in relation to the flight 'to avoid prosecution'; but it is used, quite naturally, in the second half of Sec. 1073 in relation to a flight 'to avoid giving testimony.' The two are separate crimes. The latter requires some pending criminal proceeding. The former does not. It is sufficient if the fleeing felon is 'subject to prosecution.' *United States v. Miller*, D.C., 17 F. Supp. 65, 67.
>
> "Sec. 1073 was part of the anti-racketeering legislation passed by the 73rd Congress (1934). It was intended to enable federal agencies to go into action against criminals who flee from the scene of the crime beyond the jurisdiction of the State wherein the crime is committed and eventually escape punishment entirely.' The construction of Sec. 1073 which appellants offer would serve in great measure to frustrate the federal law enforcement agencies by preventing them from go-

ing into action promptly, and it would set a premium on a quick get-away across State lines by the criminal who had committed one of the crimes of violence listed in Sec. 1073."

In *Barker v. United States*, 178 F. 2d 803, the indictment against Barker charged that he traveled from a place in Texas to one in Mississippi intending thereby to avoid prosecution for an offense of burglary committed by him in Texas. It was argued in his behalf that the provisions of the section required that a violator of the statute must be charged by the State with the offense and thereafter have traveled from the State. But the decision was to the contrary. The court declared that "the gravamen of the offense is that the defendant fled from a State with intent to avoid prosecution therein."

It seems clear to us that the crime denounced by Sec. 1073 is complete when the offender crosses the border of the state with intent to avoid prosecution for a specified crime and that its scope is not limited to the cases where such crossing is delayed until after a prosecution has been begun by the offended state.

Such flights by perpetrators of crimes against the states are a common means of hindering state justice as is well known and, as it is the federal government which accords the freedom of movement throughout the country that makes the flights possible, it is plainly within the province of that government to regulate this abuse of it. The abuse is against the peace and dignity of the United States and also that of the States.

The District Judge expressed his conclusions in this case with which we are in accord as follows:

"A reading of the statute leaves one with the impression that the principal elements essential to its [Sec. 1073] violations are: (a) the commission of a crime, followed by (2) interstate travel and (3) with intent to avoid prosecution under the laws of the state from which flight originates. There is no indication that the expression 'prosecuted' is used in any established technical or legal sense.

"If the construction urged by the defendant were the correct one, then I dare say that the statute would be an ineffective aid to the capture or prosecution of fleeing felons because of the time which would necessarily be required to institute some formal prosecution. It must be an innate instinct of a person who has committed a crime to immediately leave the scene. By modern means of transportation it takes only a matter of hours for one to reach a state border and move into interstate commerce. It would normally take at least a day, and more likely several days, for a complaint or information to be filed. To summon a grand jury and secure the return of an indictment would probably take much longer. Hence, if defendant's interpretation of the statute is accepted, the law would be an ineffective instrument for justice."

It is argued that cases may arise where a man who had nothing to do with a crime may imagine that he will be prosecuted for it and under that delusion may cross the state border to avoid prosecution.

But in this case the court instructed the jury that neither defendant could be convicted unless the jury was convinced beyond reasonable doubt that he committed the murder and the kidnapping charged in the indictment and had apprehension that he would be prosecuted for such crime and fled

the state with intent to avoid prosecution therefor.[1] Undoubtedly the determination by the jury that defendants committed the crimes also had to do with the conclusion that the subsequent travel of defendants in interstate commerce to Georgia was with the intent charged in the indictment.

It is true that wherever an act that is innocent and lawful in itself is made criminal by reason of the intent with which it is committed a possibility of error results as to whether the requisite intent existed in a given case. That possibility is present under this statute. But we do not find the statute either ambiguous or unconstitutional.

The gravamen of the offense proscribed by it is as declared in *Barker v. United States*, supra, "that the defendant fled from a state with intent to avoid prosecution there-

[1] The court instructed:

"In order to find either of these defendants guilty of the crimes charged against them, two things are essential:

"First, you must find beyond a reasonable doubt that the particular defendant kidnapped and murdered Anthony DeVito in the State of Minnesota."

* * *

"The second essential is proof beyond a reasonable doubt that the particular defendant fled from Minnesota across a state line with the intent of avoiding prosecution for the crimes of murder and kidnapping.

* * *

"Now, in order for any travel in interstate commerce to constitute a violation of this unlawful flight statute, it must occur and must be coupled with this intent to avoid prosecution. It is not required that at the time of interstate travel there be then existing charges by state authorities through indictment or complaint or otherwise; but the intent to avoid prosecution does require that the defendant be aware at the time of his interstate travel of the fact that the crime of murder or kidnapping of DeVito had been committed and that at that time the defendant had an apprehension that he would be or might be the subject of a Minnesota prosecution for such crime; and further that such apprehension on the part of the defendant or defendants was a reasonable one and not merely a figment of his imagination."

in." An abuse of the freedom of movement in interstate commerce is consummated with the flight over the state border, whether the state has begun prosecution or not. The indictment includes all the elements that constitute the gravamen of the offense by charging the crimes committed and the flight of defendants with the proscribed intent.

As we find no error in the record and judgments the judgments are affirmed.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit.

APPENDIX B

(Judgment in Cause No. 16163.)

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 16163—September Term, 1958.

Rocco Salvatore Lupino,

Appellant,

vs.

United States of America.

Appeal from the United States District Court for the District of Minnesota.

This cause came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Rocco Salvatore Lupino, do surrender himself to the custody of the United States Marshal for the District of Minnesota, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the said District Court.

July 7th, 1959.

(Judgment in Cause No. 16164.)

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 16164—September Term, 1958.

John Frank Azzone,

Appellant,

vs.

United States of America.

Appeal from the United States District Court for the District of Minnesota.

This cause came on to be heard on the record from the United States District Court for the District of Minnesota, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the judgment and sentence of the said District Court, in this cause, be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, John Frank Azzone, do surrender himself to the custody of the United States Marshal for the District of Minnesota, if not now in custody, in execution of the judgment and sentence imposed upon him, within thirty days from and after date of filing of the mandate of this Court in the said District Court.

July 7th, 1959.

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In the Supreme Court of the United States

OCTOBER TERM, 1959

No. 273

ROCCO SALVATORE LUPINO AND JOHN FRANK AZZONE, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A 21-28) is not yet reported. The opinion of the District Court (Pet. App. A 17-20, R. 9-12) is reported at 171 F. Supp. 648.[1]

[1] Although the full text of the District Court's opinion is not printed in the Record or in the Appendix to the Petition, the portion relevant to the issues presented here is so printed.

JURISDICTION

The judgments of the Court of Appeals were entered on July 7, 1959. The petition for writ of certiorari was filed on August 4, 1959. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the provision of the Fugitive Felon Act, 18 U.S.C. (1952 ed.) 1073, which punishes interstate flight to avoid prosecution, requires allegation and proof of the existence of a state prosecution, or, alternatively, allegation and proof of the commission of a state offense by the defendant.

STATUTE INVOLVED

18 U.S.C. (1952 ed.) 1073 provided:

Flight to avoid prosecution or giving testimony.

Whoever moves or travels in interstate or foreign commerce with intent either (1) to avoid prosecution, or custody or confinement after conviction, under the laws of the place from which he flees, for murder, kidnaping, burglary, robbery, mayhem, rape, assault with a dangerous weapon, or extortion accompanied by threats of violence, or attempt to commit any of the foregoing offenses as they are defined either at common law or by the laws of the place from which the fugitive flees, or (2) to avoid giving testimony in any criminal proceedings in such place in which the commission of an offense punishable by imprisonment in a penitentiary is charged, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

Violations of this section may be prosecuted only in the Federal judicial district in which the original crime was alleged to have been committed or in which the person was held in custody or confinement.[2]

STATEMENT

Petitioners were separately indicted in the District Court for the District of Minnesota in two counts for violations of 18 U.S.C. (1952 ed.) 1073, *supra*. The first count of each indictment charged that each petitioner fled in interstate commerce from Minnesota, to Florence, South Carolina, and elsewhere, "with intent to avoid prosecution under the laws of the State of Minnesota for the crime of murder in the first degree as defined by the laws of the State of Minnesota, to-wit, the murder of one Anthony Ralph DeVito committed on or about the 28th day of September, 1953, in the Third Division, State and District of Minnesota." The second count charged the commission of the same offense except that it alleged that the flight was "to avoid prosecution under the laws of the State of Minnesota for the crime of kidnapping, as defined by the laws of the State of Minnesota, to-wit, the kidnaping of one Anthony Ralph DeVito" at or about the same time and place charged in count one. (R. 1-4.)

Petitioners made pretrial motions to dismiss these indictments on the grounds that they did not state

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[2] By the Act of April 6, 1956 (70 Stat. 100), the words ", arson punishable as a felony" were added after "assault with a dangerous weapon." The statute is printed here as in effect at the time the offenses charged were committed.

offenses against the United States because there was no allegation that a prosecution had been instituted against them by the State of Minnesota (R. 4-9, 13). These motions were denied by the District Court in a memorandum opinion (R. 9-12).

During the trial, it was stipulated that no charges had been brought against either defendant by the State of Minnesota for the crime of murder or kidnaping of Anthony DeVito (R. 14). Evidence was received from which the jury could have found that, subsequent to the time DeVito disappeared and prior to and during the time of the departure and travel of each of the petitioners from the State of Minnesota, the police of St. Paul and Minneapolis, Minnesota, were seeking to apprehend both petitioners in connection with the then suspected murder of DeVito, and additional evidence was introduced from which the jury could find that each of the petitioners knew of these apprehension efforts (R. 43-44).[3]

The District Court instructed the jury that, before it could find either petitioner guilty of the offenses charged, it had to be convinced beyond a reasonable doubt that he had committed the murder and the kidnaping charged in the indictments (R. 20, 22, 24). The court further instructed the jury that, in order to return a verdict of guilty, it had to find beyond a reasonable doubt that the particular defendant had "fled from Minnesota across a state line with the intent to avoid prosecution for the crimes of murder

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[3] Pursuant to the rules of the Court of Appeals for the Eighth Circuit, the record in the District Court was stipulated (R. 41-48).

and kidnapping" (R. 22). In amplifying this instruction, the court stated (R. 23):

> It is not required that at the time of interstate travel there be then existing charges by state authorities through indictment or complaint or otherwise; but the intent to avoid prosecution does require that the defendant be aware at the time of his interstate travel of the fact that the crime of murder or kidnapping of DeVito had been committed and that at that time the defendant had an apprehension that he would or might be the subject of a Minnesota prosecution for such crime; and further that such apprehension on the part of the defendant or defendants was a reasonable one and not merely a figment of his imagination.

The jury returned verdicts of guilty on both counts against each of the petitioners (R. 32, 33). Judgment was entered on the verdicts and each petitioner received a general sentence of five years' imprisonment and a fine of $5000.00 (R. 34-36). On appeal, the Court of Appeals affirmed.

ARGUMENT

1. Petitioners' principal contention is that the courts below erred in holding that the Fugitive Felon Act, 18 U.S.C. (1952 ed.) 1073, *supra*, pp. 2-3, does not require the institution of a state criminal prosecution for one of the specified crimes as a condition precedent to the initiation of a federal prosecution for violation of the Act.

Section 1073 defines two offenses. The first is movement or travel in interstate commerce with in-

tent to avoid prosecution for certain enumerated crimes, under the laws of the place from which the defendant flees. The second is movement or travel in interstate commerce with intent to avoid giving testimony in criminal proceedings in a place in which the commission of an offense punishable by imprisonment in a penitentiary is charged. Before a prosecution can be instituted under the latter provision of the statute, a state criminal charge would have to be pending; this follows from the plain meaning of the statutory language "to avoid giving testimony in any criminal proceedings." . By necessary implication, "criminal proceedings" requires the existence of a pending criminal charge of some sort. However, petitioners were charged not with violating the second part of the statute but with fleeing from Minnesota with intent to avoid prosecution. It is not an essential element of this offense that a state criminal proceeding has been instituted or that a state criminal charge be pending. Prosecution is avoided by flight whether or not the prosecutive machinery has been set in motion. Moreover, it is a principal purpose of Section 1073 to permit the Federal Government to assist the states in the apprehension of those who flee from justice across interstate lines. If anything, the need for the machinery of the statute is greatest where prosecution has not yet begun, for a pending prosecution provides its own safeguards against flight (identification, fingerprinting, photographing, possible denial of bail, etc.).

The two other courts of appeals which have had occasion to consider this question are in agreement

with the decision below. *United States* v. *Bando*, 244 F.2d 833 (C.A. 2), certiorari denied, 355 U.S. 844; *Barker* v. *United States*, 178 F.2d 803 (C.A. 5), certiorari denied, 339 U.S. 968.[4] In the *Bando* case, the Court of Appeals for the Second Circuit, addressing itself to the identical issue raised by petitioners, stated (244 F.2d at 843):

> An analysis of Sec. 1073 does not support any such narrow and strained construction. The words "to avoid prosecution" mean "to avoid being prosecuted." The statute does not say "to avoid *a pending* prosecution." Nor is the word "charged" used in the first half of Sec. 1073 in relation to the flight "to avoid prosecution"; but it is used, quite naturally, in the second half of Sec. 1073 in relation to a flight "to avoid giving testimony." The two are separate crimes. The latter requires some pending criminal proceeding. The former does not. * * *

2. Petitioners also contend that Section 1073 requires allegation and proof that the defendant perpetrated the state offenses involved, and that this statutory standard was not met in this case. These arguments are likewise without merit.

(*a*). There is nothing in the language of Section 1073 to suggest any requirement of allegation and proof of the state offense. The first part of this section penalizes travel in interstate commerce with intent to avoid prosecution, or custody or confinement

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[4] The only decision to the contrary is that of a District Court. *United States* v. *Rappaport*, 156 F. Supp. 159 (N.D. Ill.).

after conviction, with respect to certain specified crimes. Petitioners' interpretation would amend the statute to provide that the offense prohibited thereby can be committed only if the accused is, in fact, guilty of the state offense.

The purpose of Section 1073 is not to convert the state offenses listed in the section into federal offenses; that would constitute a large assumption of the burdens of state responsibility by the Federal Government. To the contrary, a principal purpose of the statute was to enable the Federal Government to assist the states to determine whether or not the fugitive was in fact guilty of an offense. To require that those who flee the state to avoid prosecution be proved guilty of the state offense, beyond a reasonable doubt, in the federal courts would seriously restrict the applicability of the statute and, in effect, would prejudge state determination of the same issue. The important factor is to keep potential defendants within the bounds of the state so that the state judicial process can determine their liability to punishment.

Petitioners concede that the statute and the demands of the Constitution would be satisfied by requiring allegation and proof of a prior state prosecution (Pet. 13). Presumably, a number of state prosecutions will end in acquittals. However, under petitioners' own view, this possibility of acquittal does not bar a federal prosecution for violation of Section 1073. That being the case, there would appear to be no reason why the possibility of acquittal—*i.e.*, the possibility of innocence of the fleeing defendant of the state charge—should be a bar to a federal prosecu-

tion where formal state proceedings have not yet been initiated. In both instances the relevant factor is that prescribed in the statute itself—the intent to avoid prosecution. Where that intent, as here, is alleged and proved, the requirements of the statute have been met.[5]

(*b*). While, as just indicated, it is our position that Section 1073 does not require proof of the commission of a state crime by the defendant in the federal case, that question need not be decided here since the District Court required such proof and charged the jury that the petitioners could be found guilty of violating Section 1073 only if it were found beyond a reasonable doubt that they kidnapped and murdered Anthony DeVito. By their verdict of guilty the jury, of course, indicated that the proof met this standard and no complaint is made that the verdict was not supported by the evidence.

As for the sufficiency of the indictment, it charged the commission of the offenses in the words of the statute, and as such it was clearly sufficient. *United States* v. *Gooding*, 12 Wheat. 460, 474; *United States*

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[5] Petitioners also say that, if Section 1073 does not require proof that the defendants committed the state crime, it is void for lack of due process. But Congress, under its power to regulate interstate commerce, can provide, we submit, that the facilities of interstate commerce should not be used for flight to avoid prosecution, regardless of the ultimate guilt or innocence of the person using such facilities for such a purpose. In other words, Congress can properly require that potential defendants do not deliberately render themselves immune, by means of flight, to state prosecutorial and judicial process.

v. *Brig Neurea*, 19 Howard 92, 94; *Freeman* v. *United States*, 86 F.2d 243, 244 (C.A. 5), certiorari denied, 299 U.S. 616; *Sutton* v. *United States*, 157 F.2d 661, 663 (C.A. 5); *Ross* v. *United States*, 180 F.2d 160, 164 (C.A. 6); and, more particularly with reference to pleading an offense under Section 1073, *Barker* v. *United States, supra*, 178 F.2d at 805.[6] Even if a requirement of proof of the state offense were to be read into Section 1073, this requirement would not thereby become an explicit part of the indictment. It is well established that an indictment need not plead all of the possible refinements of proof which may be required, as long as it adequately pleads the offense in the statutory terms. Any lack of particularity can be cured by a bill of particulars. Rule 7(f), F.R. Cr. P.

Petitioners assert (Pet. 12) that, in every case which has construed Section 1073, the courts have taken the position that the statute was intended to punish "only one who in fact had committed an offense against a state or who had been charged by a state with an offense." Actually, however, no decision has held that the commission of a state offense must

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[6] Petitioners' cases do not fit any of the exceptions to this rule. In *United States* v. *Carll*, 105 U.S. 611, the indictment, though framed in the language of the statute, was set aside because of a failure to allege the intent that the instrument was uttered with knowledge that it was counterfeit within the meaning of the statute. In this case, the indictment alleged with particularity that petitioners fled interstate "with intent to avoid prosecution under the laws of the State of Minnesota for the crime of murder * * * to-wit, the murder of one Anthony Ralph DeVito * * *" (R. 1-4).

be alleged. Of the cases cited at Pet. 12, in *United States ex rel. Mills* v. *Reing*, 191 F.2d 297 (C.A. 3), certiorari denied, 343 U.S. 909, the indictment upon which the accused was being held was identical in all material respects with the indictments in this case, and, although a state charge was in fact pending, there is no discussion by the court of any necessity to allege and prove the commission of a state crime. The conviction for violating Section 1073 was set aside in *Macnza* v. *United States*, 212 F.2d 339 (C.A. 5), because of insufficient evidence, and, while the indictment charged that the state offense of murder had been committed by the defendant, there is no suggestion in the opinion that such an averment was necessary. In *United States* v. *Miller*, 17 F. Supp. 65, 67 (W.D. Ky.), while the court in overruling a demurrer to the indictment held that in order to sustain a conviction under Section 1073 it would be necessary for the government to prove that the accused had committed a state offense denounced in the statute, there is no holding that this need be alleged in the indictment. In *Simmons* v. *Zerbst*, 18 F. Supp. 929 (N.D. Ga.), the issue was the constitutionality of the statute, and, while the indictment charged the commission of a state offense by the accused, the necessity for such an allegation was neither considered or passed on by the court. Similarly, the *Barker* and *Bando* cases, *supra*, do not hold that an allegation that a state offense was committed must be included in the indictment. *United States* v. *Brandenburg*, 144 F.2d 656 (C.A. 3), in reversing a conviction for misprision of a felony, turned on the issue of whether the person

who fled to avoid prosecution had committed the type of offense covered by the then existing provisions of Section 1073.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

JOSEPH M. F. RYAN, JR.,
Acting Assistant Attorney General.

HAROLD H. GREENE,
WILLIAM A. KEHOE, JR.,
Attorneys.

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